LIBRARY
SUPREME COURT. U. S.

FEB 28 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 1968

No. 1176

FRANCIS WILSON, - - - - - Petitioner,

versus

MARTIN J. WIMAN, Superintendent, Kentucky State Reformatory, LaGrange, Kentucky, - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JOHN DAVID COLE,
P. O. Box 566,
Bowling Green, Kentucky,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGE

Opinions Below 1– 2

Jurisdiction 2

Questions Presented 2

Statute and Procedure Involved 3

Statement 4– 5

Reasons for Granting Writ 5– 9

Burgett v. Texas, No. 53, decided November 13, 1967, ___ U. S. ___, 19 L. Ed. 2d 319, 88 S. Ct. ___ 8

Gideon v. Wainwright, 372 U. S. 335 (1963) 7

Jackson v. Denno, 378 U. S. 360 (1964) 7

Krulewitch v. United States, 336 U. S. 440, 453 .. 9

Mapp v. Ohio, 367 U. S. 643 (1961) 7

Murphy v. Waterfront Commission of New York Harbor, 378 U. S. 52 (1964) 7

Palko v. Connecticut, 302 U. S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149 7

Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 ALR 575 6

Spencer v. Texas, 385 U. S. 554 (1967) 6, 8, 9

Wilson v. Commonwealth, Ky., 403 S. W. 2d 705 (1966) 1, 3

Wilson v. Commonwealth, Ky., 403 S. W. 2d 710 (1966) 1, 4

Conclusion 10

Appendix A 11–12

Appendix B 13

Appendix C 14

Appendix D 15–18

Appendix E 19–23

IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 1968

No. _____

FRANCIS WILSON, - - - - *Petitioner,*

v.

MARTIN J. WIMAN, Superintendent,
Kentucky State Reformatory,
LaGrange, Kentucky, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on December 11, 1967.

OPINIONS BELOW.

The Petitioner perfected an appeal to the highest court of Kentucky, *Wilson* v. *Commonwealth,* Ky., 403 S. W. 2d 705 (1966), and after affirmance of his conviction, he exhausted the available state post conviction remedies. *Wilson* v. *Commonwealth,* Ky., 403 S. W. 2d 710 (1966). Petitioner then filed an application for a writ of habeas corpus in the United States District Court for the Western District of Kentucky.

From the denial of that writ, see Appendix D, an appeal was taken to the United States Court of Appeals for the Sixth Circuit, the majority and concurring opinions have not yet been reported, however, are set forth in the Appendix E.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 11, 1967, and subsequently orders were entered on December 29, 1967, and January 23, 1968, staying the issuance of a mandate.

QUESTIONS PRESENTED.

1. Where the records of the Warren Circuit Court do not specifically indicate Petitioner was appointed counsel during his 1933 trial and conviction, and there being a strong presumption against the waiver of this constitutional right, was Petitioner's conviction in violation of the due process clause of the Fourteenth Amendment?
2. Whether the trial jury's joint consideration at Petitioner's 1964 trial in the Monroe Circuit Court of the specific crime therein alleged, plus the matter of his two former convictions, destroyed the jury's impartiality and violated Petitioner's rights under the due process clause of the Fourteenth Amendment?

STATUTE AND PROCEDURE INVOLVED.

KRS 431.190

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner in or out of this state.

The present criminal procedure followed by the state court in the application and enforcement of the above statute permits the Commonwealth's Attorney to read the entire habitual criminal indictment to the jury at the outset of the trial. See *Wilson* v. *Commonwealth,* Ky., 403 S. W. 2d 705 (1966). During the course of the trial, the jury is permitted to hear testimony factually proving the prior felony convictions, and the identity of the accused as the convicted felon. The jury instructions make reference to the prior convictions, see Appendix C, and there is no provision required a limiting instruction or permitting the accused to stipulate the prior convictions.

STATEMENT.

On April 14, 1933, Petitioner was convicted of Dwelling House Breaking in the Warren Circuit Court, at which time he was seventeen years of age. Subsequently, on January 11, 1935, he was convicted of Dwelling House Breaking in the Warren Circuit Court, and served a two year sentence.

At the time of Petitioner's 1933 conviction, it was stipulated by the parties in the state court that Petitioner was seventeen years of age and the record books of the Warren Juvenile Court indicated the Juvenile Court did not accept jurisdiction of Petitioner, and waived his juvenile rights. See *Wilson* v. *Commonwealth,* Ky., 403 S. W. 2d 710 at 713 (1966). The 1933 conviction constitutes a guilty plea to breaking in the house in which Petitioner lived, the house being that of an uncle, who had taken Petitioner in as an orphan. The records of the Warren Circuit Court do not reflect Petitioner was appointed counsel in 1933, or that he waived this right.

The name "Stagner" appeared on the indictment, however, the record is silent as to whether Attorney Stagner in fact represented Petitioner at either the arraignment or trial.

Petitioner returned to Warren County, and in 1953 his citizenship was restored by the Governor of the Commonwealth of Kentucky. He was elected constable of the Greencastle District in which capacity he was serving at the time of his indictment in Monroe County on August 3, 1964.

The Petitioner was indicted in Monroe County for storehouse breaking, after having been twice convicted of felonies. He was found guilty, and sentenced to hard labor for the rest of his natural life.

At the outset of Petitioner's trial in Monroe County, the entire indictment was read the trial jury, whereby the jury was informed of the prior felony convictions. During the course of the trial, evidence was introduced identifying Petitioner as one and the same person as the Francis Wilson convicted of felonies in 1933 and 1935. On cross-examination highly prejudicial testimony was elicited, in addition to the prior convictions. See Appendix B. The prior felony convictions were also referred to in the jury instructions. See Appendix C. The trial record reflects that no limiting instructions or admonitions were given.

REASONS FOR GRANTING WRIT.

The ruling of the Court below, upholding the constitutionality of the single-stage habitual criminal procedure, is in conflict with decisions in the Third and Fourth Circuit Courts of Appeal, and it is respectfully submitted in conflict with a decision of this Court. This is a matter of substantial public importance, which is further underscored by a division of practice among the states. See Appendix A. It appears that some 28 states have recidivist procedure which postpones the introduction of prior convictions until after the jury has found the accused guilty of the crime currently charged. Three states afford the accused the

right to stipulate the prior crimes, thereby mitigating the prejudicial effect. Two states take prior convictions into account in the determination of when a convict is eligible for parole, and entrust the fact-finding determination to parole boards. Thus, only 17 states still maintain the single-stage habitual criminal procedure upheld by the lower Court.

No justification for the onerous procedure used in the application of the Kentucky Habitual Criminal Procedure has ever been advanced except that it has been on the statute books for many years. The fact that many progressive states have recognized the inherent unfairness of this procedure and have changed their procedure to avoid informing the jury of prior offenses before determination of the present charge is evidence enough of the basic unfairness to the accused. A prime example is Texas Penal Code, Art. 36.01, which became effective on January 1, 1966, thereby reversing the effect of *Spencer* v. *Texas,* 385 U. S. 554 (1967).

It must be remembered that due process of law has been construed, not as a rigid exclusionary rule of evidence, but rather as a constitutionally imposed standard of "fairness" required of all state proceedings. As Mr. Justice Cardozo twice interpreted due process to be a constitutional guarantee "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 ALR 575, or are "implicit in the concept of ordered liberty."

Palko v. *Connecticut,* 302 U. S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149.

The concern for due process in state criminal proceedings has been expressed in the following cases. In *Mapp* v. *Ohio,* 367 U. S. 643 (1961), the guarantee of the Fourth Amendment against unreasonable searches and seizures was held applicable to state proceedings. In *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the Sixth Amendment's guarantee of the right of counsel was made obligatory upon the states. In *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964), the Fifth Amendment's privilege against self-incrimination was made applicable to the states. In *Jackson* v. *Denno,* 378 U. S. 360 (1964), this Court rejected a state procedure permitting the jury to determine the voluntariness of a confession. It is respectfully submitted that in light of the above cases, the guarantee of trial by an impartial jury, as provided in the Sixth Amendment, would be obligatory upon the states under the due process clause of the Fourteenth Amendment.

This case cannot be distinguished on the basis Petitioner elected to take the stand, and testify in his own behalf, resulting in the prior convictions being properly admissible. After the jury was informed of the prior convictions, Petitioner's right to elect not to testify, rendering the prior convictions inadmissible, was destroyed. His right to remain silent is made meaningless by the subject procedure.

The instruction given by the trial court is set forth in Appendix C, and a review of the record will reflect

that no limiting instructions were given the jury concerning the prior convictions. The jury was never told that the prior convictions were not to be considered as evidence of or propensity to commit the present crime. Further, the instruction is so phrased that the jury could not find Petitioner guilty of the present crime, but not find as fact the two prior convictions, which could have resulted in a sentence of one to five years, rather than life, or permit the jury to find as fact only one prior felony conviction, which could have resulted in a sentence of four years. The writer was not trial counsel, and the record does not reflect whether additional instructions or admonitions were requested. The Kentucky Rules of Criminal Procedure, Rule 9.54, provides, "It shall be the duty of the Court to instruct the jury in writing on the law of the case. *Objections to instructions shall not be necessary to preserve error.* The instructions shall be read to the jury prior to the closing summations of counsel." The instruction is erroneous on its face, and such error may be properly considered at this time.

In *Burgett* v. *Texas,* No. 53, decided November 13, 1967, —— U. S. ——, 19 L. Ed. 2d 319, 88 S. Ct. ——, this Court's holding in *Spencer* v. *Texas,* 385 U. S. 554 was qualified, in that the *Spencer* case reliance was placed solely on a general "fairness approach," while in *Burgett* the Court considered the denial of a "specific federal right."

The Petitioner, Francis Wilson, states that by virtue of the single-stage habitual criminal procedure, permitted by the Kentucky state courts, he was denied

the following constitutional rights; the right to a fair and impartial trial, as guaranteed by the Sixth Amendment; the use of a prior conviction obtained by denial of counsel, in further violation of his rights under the Sixth Amendment; and that from the totality of the facts, the trial failed to afford Petitioner that fundamental fairness required of state criminal proceedings by the due process clause of the Fourteenth Amendment.

It is respectfully submitted that for this Court to condone Petitioner's conviction under the Kentucky Habitual Criminal Procedure, it must necessarily define due process of law, not as a standard of fundamental fairness in state proceedings, but rather in terms of geography. In at least thirty-three states Petitioner would be afforded a new trial, and of the remaining seventeen, only Texas and Kentucky have had occasion to recently face the problem. The state of Texas reversed the *Spencer* case by statute, and Kentucky stands alone. In this case the Court did not even give a limiting instruction or admonition concerning the relevance of the prior convictions, and even if it had, as Mr. Justice Jackson said in *Krulewitch* v. *United States,* 336 U. S. 440, 453, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN DAVID COLE,
Post Office Box 566
Bowling Green, Kentucky,
Counsel for Petitioner.

APPENDIX

APPENDIX

APPENDIX A

The States Which Have Adopted a Procedure Either By Legislation or Judicial Decision Which Separates the Determination of Prior Convictions From the Determination of Guilt of the Crime Currently Charged:

1. Alaska, Alaska Stat. §12.55.060 (1962);
2. Arkansas, Miller v. State, 394 S. W. 2d 601 (1965);
3. Colorado, Heinze v. State, 253 P. 2d 596 (1953);
4. Connecticut, State v. Ferrone, 113 A. 452 (1921);
5. Delaware, Del. Code Ann., Tit. 11, §3912 (b) (Supp. 1964);
6. Florida, Fla. Stat. Ann. §775.11 (1944), Shargaa v. State, 102 So. 2d 814 (1958);
7. Idaho, State v. Johnson, 383 P. 2d 326 (1963);
8. Kansas, Kans. Gen. Stat. Ann. §21-107 (a) (1949);
9. Louisiana, La. Rev. Stat. Ann. §15.529.1 (D) (Supp. 1964);
10. Maryland, Md. Rule of Proc. 713;
11. Michigan, Mich. Stat. Ann. §28.1085 (1954);
12. Minnesota, Minn. Stat. Ann. §609.19;
13. Missouri, Mo. Stat. Ann. §556.280;
14. Nebraska, Nebr. Rev. Stat. §29-2221;
15. New York, N. Y. Penal Law §1943;
16. New Mexico, Johnson v. Cox, 380 P. 2d 199 (1963);
17. North Dakota, N. D. Cent. Code §12-06-23 (1960);
18. Ohio, Ohio Rev. Code Ann. §2961.13 (1954);
19. Oklahoma, Okla. Stat. Ann., Tit. 22, §860 (Supp. 1964), Harris v. State, 369 P. 2d 187 (1962);
20. Oregon, Ore. Rev. Stat. §168.065 (Supp. 1963);
21. Pennsylvania, Pa. Stat. Ann., Tit. 18, §5108 (1963):

22. South Dakota, S. D. Code §13.0611 (3) (1939);
23. Texas, Texas Penal Code, Art. 36.01 (1966);
24. Tennessee, Tenn. Code Ann. §40-2801, Harrison v. State, 394 S. W. 2d 713 (1965);
25. Utah, Utah Code Ann. §76-1-19, State v. Stewart, 171 P. 2d 383 (1946);
26. Virginia, Code of Va., §53-296 (1958);
27. Washington, State v. Kirkpatrick, 43 P. 2d 44 (1935);
28. West Virginia, W. Va. Code Ann. §6131 (1961).

Two States Take Prior Convictions Into Account in the Determination of When a Convict Is Eligible for Parole, and Entrust the Fact-Finding Determination to Parole Boards:

1. Mississippi, Miss. Code Ann. §4004-04 (Supp. 1962), as amended, Miss. Laws 1964, c. 366;
2. New Jersey, N. J. Stat. Ann. §30.4-123.12 (1964), N. J. Stat. Ann. §2A: 85-13 (Supp. 1964).

The Three States Which Have Adopted a Stipulation Procedure Are:

1. California, Cal. Penal Code §1025, People v. Hobbs, 98 P. 2d 775;
2. Arizona, Ariz. Rule Crim. Proc. 180, Ariz. Code Ann. §44-1004, Montgomery v. Eyman, 391 P. 2d 915 (1964);
3. Wisconsin, State v. Meyer, 46 N. W. 2d 341 (1951).

APPENDIX B

Portion of the Commonwealth Attorney's Cross-examination of Petitioner Appearing in Trial Record, Page 132:

"67. Did you ever know Elmer Turner before?

A. Yeah I had heard of him.

68. Did you ever see him?

By Mr. Hollingsworth: (defense attorney) Tell it, tell it.

A. Yes, I have known Elmer Turner quite a few years. He killed two of my wives own cousins.

69. Did what?

A. He killed two of my wives own cousins.

70. That before you killed this man or afterwards?

A. What do you mean, which one did I kill?

71. Didn't you kill a man a few years ago?

A. I shore did. He robbed a place, and I caught him on the road. I shot him. I didn't aim to, I tell you that, I sure didn't aim to.

72. Did you kill him to keep him from talking?

By Mr. Hollingsworth: Your Honor, please I object.

By the Court: Objection sustained. I think you both have gone far afield.

By Paul Carter: He brought that in first."

APPENDIX C

Instruction Given By the Judge of the Monroe Circuit Court on August 3, 1964, in Trial of Petitioner for Storehouse Breaking After Having Been Twice Convicted of Felonies.

If the jury believes from the evidence, beyond a reasonable doubt, that the defendant, Francis Wilson, in Monroe County and before the finding of the indictment herein, and on or about the 6th day of June, 1964, did unlawfully, wilfully and feloniously break and enter into the store house of S. D. Harlin, Co., with the intent to steal therefrom; and if the jury further believe from the evidence, beyond a reasonable doubt, that in April, 1933, the defendant was convicted in the Warren Circuit Court for Dwelling House Breaking a felony; and if the jury further believe from the evidence, beyond a reasonable doubt, that in January, 1935, the defendant was convicted in Warren Circuit Court for Dwelling House Breaking a felony; and that said offense was committed after the defendant's conviction in 1933, then you should find the defendant guilty as charged in the indictment and fix his punishment at imprisonment in the State Reformatory for Life.

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 5424

Francis Wilson, - - - - - - - Petitioner,

v.

Martin J. Wiman, Superintendent, Kentucky State Reformatory, LaGrange, Kentucky, - Respondent.

ORDER AND OPINION.

Petitioner, Francis Wilson, a state prisoner, has tendered an application for a writ of habeas corpus. The record reveals that petitioner was convicted in 1933 of dwelling house breaking. Petitioner served his sentence and was released. In 1935, he was again convicted of dwelling house breaking in the Warren Circuit Court. This sentence was likewise served and he was released. In 1964, petitioner was convicted in the Monroe Circuit Court for storehouse breaking and, as a third offender, was sentenced to life imprisonment as authorized under Kentucky's Habitual Criminal Act KRS 431.190. Petitioner is presently confined under this conviction.

Petitioner made a direct appeal to the Kentucky Court of Appeals from his Monroe Circuit Court conviction. The opinion of the Court is reported in 403 S. W. 2d 705. Petitioner also appealed from an order of the Warren Circuit Court which denied a motion under RCr 11.42 to va-

cate the 1933 conviction of Dwelling House Breaking. The Court of Appeals affirmed the Warren Circuit Court in an opinion reported in 403 S. W. 2d 710. Petitioner has exhausted his state remedies for matters of the instant motion.

Petitioner in this Court raises two grounds for relief, alleging:

1. The records of the Warren Circuit Court do not specifically indicate petitioner was appointed counsel at the time of his 1933 trial and conviction for dwelling house breaking, and there being a strong presumption against waiver of this constitutional right, the conviction was in violation of petitioner's right, the the due process clause of the fourteenth amendment.
2. The trial jury's joint consideration, at his trial in 1964 in the Monroe Circuit Court, of the specific crime there alleged plus the matter of his two former convictions, all of which it is alleged destroyed the jury's impartiality, thereby denying petitioner due process of law and rendering his resulting conviction void.

Both of these points have been considered by the Kentucky Court of Appeals and are discussed in the aforementioned reported opinions.

In the instant application, there is no clear showing by petitioner of lack of counsel at the time of his trial and conviction in 1933. He merely says there was none. The record contradicts this for it has been established that the name of a regular practicing attorney of the local Bar where the trial and resultant conviction occurred appears at the top of the indictment, and the Kentucky Court of Appeals established to its satisfaction that it was the practice of the then trial judge to place the name of the defense attorney at the top of the indictment. Moreover, the jury's verdict appears written upon the indictment and was signed

by the foreman. It must be presumed that the proceedings were correct and the burden rests on the accused to show otherwise, and here the presumption of correctness is additionally supported by a reflection that a trial was had and a defense counsel was identified. The presumption to us is not rebutted by the mere allegation of petitioner, 'lo these many years later when the memory of man is dimmed by the passage of time, by the mere statement he had no counsel. United States v. Morgan, 346 U. S. 502, and cases cited therein at page 512.

Petitioner's second ground for relief is directed at the question of the constitutionality of the Kentucky Habitual Criminal Act KRS 431.190. The Kentucky Court of Appeals has twice within the last year upheld the Kentucky statute and at least one federal court has upheld a similar statute as being constitutional. See In Matter of Breen, 237 F. Supp. 575; and Breen v. Beto, 341 F. 2d 96 (5th Cir., 1965). Also, Taylor v. Beto, 346 F. 2d 157 (5th Cir., 1965); also see Stephens v. State, 1964, Tex. Cr. App., 377 S. W. 2d 189, cert. denied, 1965, 85 S. Ct. 1344 (April 26, 1965).

In direct conflict with these Fifth Circuit cases is the case of Lane v. Warden, 320 F. 2d 179 (4th Cir., 1963), which held that procedure followed in Maryland, similar to that followed in Kentucky's habitual criminal act, "destroyed the impartiality of the jury and denied him due process of law". The Sixth Circuit Court of Appeals has not yet considered the question, although a U. S. District Court for the Middle District of Tennessee has concurred both in the reasoning of the Lane Decision, Supra, and the Tennessee State Court of Appeals' case which invalidated a Tennessee Habitual Criminal Act. Harrison v. State, Tenn., 394 S. W. 2d 713 (Sept. 14, 1965).

The Supreme Court of the United States has granted certiorari in Reed v. Beto, 343 F. 2d 723 (5th Cir., April 7,

1965), and an authoritative answer to the problem may be forthcoming.*

In the interim, this Court is of the opinion that the general principle enunciated in Smith v. State of Alabama, 124 U. S. 465, 8 S. Ct. 564, is controlling in matters of this nature. In Smith, supra, the Court held that a state may freely legislate with respect to the rights, duties and liabilities of its citizens, subject only to requirement that their laws must not violate federal constitutional provisions and principles. This philosophy of jurisprudence was stated in a more relevant and meaningful manner when Mr. Justice Harlan, writing for a majority of the Supreme Court in Hoag v. New Jersy, 356 U. S. 464 at 468, 78 S. Ct. 892 at 833 (1958), said "For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice". See also Twining v. New Jersey, 211 U. S. 78.

Supreme Court dicta in Chandler v. Fretag, 348 U. S. 3, 75 S. Ct. 1, gives oblique approval to the procedure challenged in the instant petition. This dictum was recently reiterated in Oyler v. Boles, 368 U. S. 448, 82 S. Ct. 501 (1962).

This Court concludes, therefore, that until such time that the Supreme Court, either by implication or more properly by express language, adjudges the type of statute in question to be invalid, this Court is obligated to consider and follow the presumption that the statute is valid and constitutional.

September 27, 1966.

(s) James F. Gordon,
United States District Judge.

---

*Since the writ was probably granted to resolve the apparent conflict between circuits, the advisability of the holding this petition in abeyance has been considered. However, since this is a habeas corpus proceeding, such would not appear proper.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 17539

Francis Wilson, - - - - Petitioner-Appellant,

v.

Martin J. Wiman, Superintendent, Kentucky State Reformatory, - - - Respondent-Appellee.

Appeal from the United States District Court for the Western District of Kentucky.
Decided December 11, 1967.

Before: O'Sullivan, Phillips and Celebrezze, Circuit Judges.

Celebrezze, Circuit Judge. In 1964 the Petitioner was convicted in the Monroe Circuit Court of storehouse breaking and, as a third offender, was sentenced to life imprisonment as authorized under Kentucky's Habitual Criminal Act, K.R.C. §413.190. He perfected an appeal to the highest court of Kentucky, Wilson v. Commonwealth, 403 S. W. 2d 705 (Ky. 1966), and after affirmance of his conviction, he exhausted the available state post conviction remedies. Wilson v. Commonwealth, 403 S. W. 2d 710 (Ky. 1966). Petitioner then filed an application for a writ of habeas corpus in the United States District Court for the Western District of Kentucky. It is from the denial of that writ that the instant appeal is taken.

Two grounds are asserted as justifying habeas corpus relief. Petitioner first contends that the habitual criminal conviction cannot stand for the reason that one of the convictions upon which the recidivist indictment was based was void, it having been obtained at a trial where the Petitioner was not represented by counsel. Secondly Petitioner contends that the Kentucky procedure of trying the instant crime and the habitual criminal count in the same proceeding destroyed the jury's impartiality. Recognizing that Spencer v. Texas, 385 U. S. 554 (1967), foreclosed this contention, the Petitioner amended his petition to assert that the failure of the trial court to give any limiting instructions to the jury removed this case from the Spencer rule.

On the first ground it appears that the Petitioner was convicted of dwelling house breaking in the Warren Circuit Court in 1933. No adequate trial court records were available to clarify the circumstances surrounding the trial, but at least two facts are clearly established: At the time of his first conviction the Petitioner was under eighteen, and at the trial he pleaded guilty to breaking into the house of an uncle who had taken him in as an orphan. The Petitioner claims that he did not have the advice of counsel before making his plea and that he did not waive that right nor his rights as a juvenile. Several affiants testified that they were around the courthouse on the date of the 1933 trial and did not recall seeing an attorney with the Petitioner. On the Petitioner's indictment, however, the name "Stagner" was written, and evidence was presented that it was the custom in the courts of that area to enter the name of the defense counsel on the face of the indictment. It was also shown that an attorney named Stagner began practicing law in Warren County in 1932.

Petitioner relies primarily upon his bare allegation and the fact that he pleaded guilty to breaking into the house in which he lived. He contends that no lawyer would permit

such a plea. Also Petitioner contends that the presumption of regularity of court procedures must give way in this case to the presumption against waiver of counsel. But his reliance upon this conflict of presumptions is misplaced; before the conflict arises the Petitioner must establish that he did not have counsel at his trial. The District Judge was not so persuaded by the evidence presented, and from the record on appeal we cannot say that this finding of fact was clearly erroneous.

United States Ex Rel. Craig v. Myers, 329 F. 2d 856 (3rd Cir. 1964), and United States Ex Rel. Lynch v. Fay, 184 F. Supp. 277 (S.D. N.Y. 1960), upon which Petitioner relies to support his first contention, are not in point. In both of those cases it was first clearly established that the Petitioner was without counsel at his earlier trial. Perhaps the mere appearance of the name "Stagner" on the Petitioner's indictment would have been insufficient to show that Petitioner was represented by counsel. Cf. Harris v. Boles, 349 F. 2d 607 (4th Cir. 1965). But here the State produced evidence concerning the customary practice of the court and evidence that Stagner was a practicing attorney in the area at the time of the trial. This proof coupled with the presumption of regularity in court procedures is sufficient to overcome Petitioner's bare allegation that he was without counsel. Had Petitioner established that he was without counsel, a heavy burden would have rested upon the State to prove that the right to counsel had been knowingly and intelligently waived. Carnley v. Cochran, 369 U. S. 506, (1962); United States Ex Rel. Savini v. Jackson, 250 F. 2d 349 (2d Cir. 1957). Having failed in the proof, however, Petitioner does not have the benefit of the presumption against waiver of counsel.

On his second ground the Petitioner contends that, though the recidivist procedure in Kentucky might be permissible under the Spencer rule, the failure of the trial

judge to give limiting instructions to the jury concerning the prior convictions so prejudiced his case as to deny him a fair trial. It does not appear from the record before this Court whether a request for an instruction was made at the time of the charge to the jury. Nor does it appear that objection was made to the failure of the trial judge to charge concerning the prior convictions. Also the prior decisions of the Kentucky Court of Appeals relative to the instant case give no indication that this point was ever raised in the appeal or in the post conviction proceeding.

Moreover, the instant case is not factually identical to Spencer. Here the Petitioner elected to take the stand to testify in his own defense. The evidence of his prior convictions would have been properly admissible, therefore, as affecting the credibility of the Petitioner as a witness. Patton v. Commonwealth, 273 S. W. 2d 841 (Ky. 1954). So this Court is not faced with a Spencer-type case but with the proposition that the introduction of the properly admissible evidence of the Petitioner's prior convictions was so prejudicial that the failure of the trial court to sua sponte instruct the jury as to the application of that evidence deprived the Petitioner of a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Deficiencies in jury instructions, are generally waived unless they are asserted on appeal, and in the usual case the deficiency cannot be asserted on appeal unless a timely objection was made to the trial court. Nutt v. United States, 335 F. 2d 817 (10th Cir., 1964). Dirring v. United States, 328 F. 2d 512 (1st Cir. 1964). Kentucky follows the same rule. Neely v. Commonwealth, 325 S. W. 2d 79 (Ky. 1959). Although it is true that the exposure of the jury to certain evidence has been held so prejudicial that no instruction to the jury will cure the prejudice, Spencer compels the conclusion that prior convictions properly introduced are not in that category.

According to Spencer a limiting instruction would have cured the prejudicial effects of the introduction of Petitioner's prior convictions. The Petitioner was represented by counsel at his trial, on his appeal, and at his State post conviction proceedings. Having bypassed his opportunity to object to the lack of an instruction in these proceedings, the Petitioner cannot now raise the issue in a federal collateral attack on his trial.

The judgment of the District Court is affirmed.

Phillips, Circuit Judge. Concurring.

I agree that the presumption of regularity of court records and procedures is sufficient under the facts of this case to support the conclusion that appellant was represented by counsel at his trial in the State court in 1933.

I concur in the second ground of the opinion only because this Court is bound by the majority opinion in Spencer v. Texas, 385 U. S. 554, which was followed in Haggard v. Henderson, 382 F. 2d 288 (6th Cir.). Otherwise I would reverse for the reasons expressed in the dissenting opinion of the Chief Justice in Spencer v. Texas and his concurring opinion in Burgett v. Texas, ___ U. S. ___, 36 U. S. L. W. 4014.